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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1015

SINCLAIR REFINING COMPANY,

Petitioner,

against

VILLAIN & FASSIO, INTERNAZIONALE DI GENOVA SOCIETA RIUNITE DI NAVIGAZIONE, S.p.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The instant petition seeks only further review of an adverse decision reached essentially on factual grounds by the United States District Court for the Southern District of New York and affirmed unanimously by the Second Circuit. Neither of the decisions below involves any significantly new or unusual interpretation of federal admiralty law.

Issues Decided Below

The District Court (Edelstein, *J.*) held petitioner's fully loaded tanker solely at fault for this Delaware River collision with respondent's anchored M V ANGELA FASSIO primarily because the tanker was admittedly pro-

ceeding at excessive speed in thick fog (162a-163a) and because respondent's lawfully anchored vessel enjoyed a high presumption of innocence which was not rebutted (161a).

The District Court held also that, even if petitioner's vessel had, as it contended, turned out of the channel on hearing a "three whistle" signal from out of the fog ahead, it committed thereby an additional statutory fault in making such blind maneuver in dense fog without reducing speed because it had failed, as required by Inland Rule 16 (33 U.S.C. 192), to "* * * stop her engines, and then navigate with caution until danger of collision is over". In so holding, the District Judge stated (176a):

> "What was in the minds of the captain and pilot of the Sinclair which motivated them to maneuver as they did will forever remain in the realm of conjecture. But what is clear is that Sinclair was careless and reckless and is solely at fault for the collision with the Angela Fassio."

Neither the District Court nor the Circuit Court (Friendly, Smith, and Marshall, *JJ.*) held, as petitioner asserts, that the Inland Rules should be read as incorporating the provisions of the International Rules which permit use of the "R" signal (short, long, short blasts) to denote a vessel at anchor in fog. Both courts decided *only* that the special circumstances of the particular case warranted the use of a supplementary signal and that use of the internationally known "R" signal was not inherently confusing and therefore *not unlawful*.

The District Court held also, without comment by the Circuit Court, that (173a):

> Even giving the Sinclair the best of all the arguments concerning the propriety of the supplement-

ary signal would not require the Fassio to share the damages. Sounding this supplementary signal here would be, at best, a passive or minor fault, and would come within the major-minor fault principle (citing cases). The gross faults of the Sinclair so flagrantly and heavily outweigh any passive fault on the part of the Fassio that in this case it is particularly apt to say that 'the interests of justice are best served by condemning the culpable vessel completely'. *Compania de Maderas de Caribien* v. *The Queenston Heights*, 220 F. (2d) 120, 1923 (5th Cir.), cert. den. 350 U. S. 824 (1955)."

Statutes Involved

In addition to the statutory provisions referred to in the petition, there are also involved Articles 16 and 18, Rule IX, of the Inland Rules (30 Stat. 99, 100; 33 U.S.C. 192, 203) which are printed in the appendix (infra, p. 12).

Facts in Brief

While properly anchored in dense fog of 100 yards visibility approximately one ship length off the easterly edge of the Delaware River channel, respondent's M/V ANGELA FASSIO was struck heavily by petitioner's fully loaded tanker, SS E. W. SINCLAIR. The anchor fluke of the tanker tore through the starboard plates and frames of the anchored vessel for a distance of some 180 feet before the tanker came to rest in response to her engines which were turning emergency full astern.

The SINCLAIR, inbound to the Philadelphia area, had been proceeding up-channel about four miles astern of respondent's vessel. The tanker's radar was inoperative. On encountering thick fog in the area of buoy "42" marking the easterly edge of the channel, ANGELA FASSIO had

turned out of the channel to the east and anchored. The SINCLAIR entered fog a short time later proceeding at ten knots with a flood current of 1½ knots. Those in charge of the SINCLAIR claim to have heard, on entering and shortly after entering the fog, two sets of whistle signals from ahead indicative of an unseen vessel backing down (three short blasts). Whether for this or some other reason (possibly to anchor as suggested by respondent's proof at the trial), the SINCLAIR turned out of the channel on passing buoy "42" bearing down on the unseen ANGELA FASSIO at an effective speed in excess of 11 knots.

Meanwhile, the anchored ANGELA FASSIO, equipped with a functioning radar, had detected electronically the approaching SINCLAIR at a distance of some three miles. Radar observation indicated a vessel approaching at unbated high speed. Limitations of radar target discrimination required her master to assume that the target was proceeding along either the extreme easterly edge of the channel or even more directly toward his unmaneuverable ship. The easterly set of the current could be expected to set the approaching ship down on the ANGELA FASSIO. Having himself encountered fog in the same area only a half hour earlier, he knew that visibility was barely more than half the length of the approaching ship. Nor could he overlook the possibility that the approaching ship might intend to anchor as he had done earlier. The ANGELA FASSIO's fog bell, although being in all respects properly sounded, could not be heard in time to avoid collision (155a).

The ANGELA FASSIO twice sounded the international "R" signal (short, long, short blasts), once when the ships were 1.0 miles apart and once when only a half mile separated the ships. Shortly afterwards the SINCLAIR was

observed to emerge from the fog close at hand and at high speed. The collision ensued.

Reasons for Denying the Writ

The writ should be denied because the petition fails to show any legal issue requiring the attention of the Court. The question decided below was simply whether, under well-established navigational rules, the use of a supplementary signal in addition to the required bell signal was warranted. The decisions below were clearly controlled by the particular facts of the case and may not reasonably be read as having any broader import.

Article 27 of the Inland Rules (33 U. S. C. 212) requires that "* * * due regard shall be had to all dangers of * * * collision * * *" and authorizes a "departure" from such rules when "* * * necessary in order to avoid immediate danger". Article 29 (33 U. S. C. 221), commonly referred to as the General Prudential Rule, expressly provides that:

> "Nothing in these rules shall exonerate any vessel * * * from the consequences of * * * the neglect of any precaution which may be required by the ordinary practices of seamen, or by the special circumstances of the case."

Thus, the Inland Rules authorize "departure" from the prescribed system of signals in special circumstances where necessary to avoid danger of collision and condemn robot-like adherence to such prescribed system when it should be apparent that the signal specified is not equal to the requirements of the occasion.

United States v. *Woodbury*, 175 F. 2d 854 (1st Cir., 1949), referred to with approval by the petition (p. 4), held a vessel in inland waters at fault for ***not*** utilizing a warning signal prescribed by the International Rules.

There, as here, the Court was required to decide what action, if any, was required by the particular circumstances presented. In that case, a trawler was fishing during daylight hours with her nets down in an area in which the master knew a submarine was maneuvering. Although the Inland Rules did not specifically require that such a trawler exhibit any signal during daylight hours to warn that her nets were down, the Court nevertheless held the trawler at fault for failing to give the submarine an effective warning of danger by displaying the appropriate international signal.

Captain Zustovich of the ANGELA FASSIO had approximately three minutes in which to appraise the probable danger of collision and to decide what, if any, further precaution he should take to avoid it. More than three years of erudite hindsight has failed to demonstrate either that his decision was wrong or that it could have been improved upon. See *The Gulfstar,* 136 F. 2d 461, 465 (3rd Cir., 1943) with respect to "after the event" criticisms of "those who navigate from the witness chair." Captain Zustovich, although sounding the prescribed fog bell, knew that it was not designed to and could not be heard in time aboard a vessel traveling at a speed of 10 knots in fog. *Petition of Socony Vacuum Transp. Co.,* 93 F. Supp. 718 at 734, 736 (S.D. N.Y. 1950).

In the District Court, petitioner contended that if any signal was required, the "danger" signal (four short blasts) should have been used and, alternatively, that ANGELA FASSIO had actually sounded a backing signal (three short blasts) which confused those in charge of the SINCLAIR. On appeal to the Circuit Court, petitioner changed tactics, arguing that the fears of Captain Zustovich were groundless and that he should not have sounded any signal at all but merely awaited develop-

ments. Both courts concluded on the basis of the facts presented that the use by the ANGELA FASSIO of a whistle signal to supplement the prescribed but ineffective fog bell was a matter of prudent seamanship which was permitted by the Inland Rules (71a-172a); that ANGELA FASSIO had, in fact, sounded the "R" signal (169a); that such signal was known to both the captain and pilot of the SINCLAIR as well as to mariners generally (171a) and that, since it was not misleading, use of the "R" signal by the FASSIO was not improper (171a).

The "danger" signal advocated by petitioner as the only permissible "departure" from the Inland Rules is itself expressly forbidden by such rules except in the case of vessels both of which are maneuvering in sight of each other. Art. 18, Rule IX (33 U.S.C. 203). Whether it may also have been properly used by an anchored vessel, in fog is quite beside the point. The Inland Rules make specific provision only for the use of a fog bell by a vessel at anchor in fog (Art. 15(d), 33 U.S.C. 191). Accordingly, whatever *whistle* signal was used would, in the same sense, be a "departure" from the Rules.

Stripped to its essentials, the basis of SINCLAIR's petition is that, although this Court has not outlawed the potentially confusing use of the "danger" signal by vessels in fog as a supplementary warning, nevertheless, it should do so with respect to the "R" signal. In support of such contention, it cites only Farwell's *"The Rules of the Nautical Road"*, as edited by Lt. Commander Alfred Prunski. While well known as a navigational handbook, such work neither is nor pretends to be an analytical legal treatise. The single sentence upon the literal meaning of which SINCLAIR places such cardinal reliance, is found in the chapter entitled "Rules in Fog". As is true

of the entire edition (see foreword, p. xii), the material contained in such chapter, is concerned primarily with detailing the differences between the signals specifically prescribed by the Inland Rules and by the International Rules. In the same chapter, the author recognizes that, in special circumstances, the courts have approved the use of supplementary signals in fog in addition to those specifically prescribed by the Inland Rules.

The cases upholding the use of a "danger" signal in special circumstances do not consider the use of a supplementary signal to be an *unauthorized* departure from the Inland Rules. Articles 27 and 29 authorize and, at times, mandate unusual action for unusual conditions.

Petition of Clyde-Mallory Lines, 1937 A.M.C. 837, not otherwise reported (S.D. N.Y. 1934);
Victorias Milling Co. v. *SS Gulfport*, 166 F. Supp. 396 (S.D. N.Y., 1958), aff'd mem. 262 F. (2d) 349 (C.C.A. 2, 1958);
City of Alexandria, 31 F. 427 (S.D. N.Y., 1887);
The Merchant Prince (1892), Prob. Div. 179, cited with approval in *The Oregon*, 158 U. S. 186, 39 L. Ed. 943 (1894).

As noted by the petition (p. 8), the "R" signal was introduced by congressional amendment to the International Rules effective January 1, 1954. The cases referred to above and *Union Shipping & Trading Co.* v. *U. S.*, 127 F. 2d 771 (C.C.A. 2, 1942) cited in the petition (pp. 7, 9) were concerned exclusively, as were the Courts below in the instant case, with the essentially factual issue of whether truly unusual or special circumstances were proven. Although such cases passed upon the circumstances under which a supplementary signal might or might not be used, they did not consider the use of the "R" signal as a

supplementary warning. This is only because all such cases antedated the more recent recognition and promulgation of the signal. None of such cases, however, turned upon the particular signal used but rather upon whether any supplementary signal was warranted or required by the facts as found by the court.

The remaining cases cited by petitioner, viz. *Oaksmith* v. *Garner*, 205 F. 2d 262, 266 (9 Cir., 1953); *Belden* v. *Chase*, 150 U. S. 674 (1893), are concerned with situations in which the procedures and signals specifically prescribed by the Inland Rules were either not observed or deliberately avoided. In the case at bar, the required fog bell was found to have been properly sounded by the ANGELA FASSIO (154a). Accordingly such decisions are inapposite to the case at bar.

The petition is also premised upon the unwarranted factual assertions that (a) there was no occasion for the use of any supplementary signal, and (b) the "R" signal, indicating a ship at anchor in fog, was comparatively unknown and therefore not an appropriate choice of a supplementary signal. Both such factual contentions were thoroughly considered and rejected by the District Court. Both were again considered and rejected by the Circuit Court on appeal. Such discredited contentions are nevertheless postulated as fact for purposes of the petition.

Thus, the petition asserts that the ANGELA FASSIO should simply have ignored the rapidly approaching radar target (p. 7), even though but a half mile distant (p. 5). The SINCLAIR, it is claimed, would have passed unseen if the fog on the easterly edge of the channel at a distance of 250 meters or one ship's length. The master of the FASSIO was, however, entitled and required to act on the

basis of observed information *then* available to him. He was not, as asserted, privileged to ignore such clear warning of imminent danger upon the chance that hindsight might disclose a different situation. In fact, by their own version of the matter, those in charge of the SINCLAIR made just such a guess and guessed wrongly with near calamitous results (167a).

The "R" signal was known to mariners the world over, whether deep sea or shoal, as denoting a ship at anchor in fog. Both the master (75-76b) and pilot (62a) of the SINCLAIR testified they were familiar with the signal and its meaning. The FASSIO's pilot failed to recognize the signal because he was below in a closed cabin and partially asleep at the time (82a)—a circumstance not disclosed by the petition in attributing to such pilot (p. 7) the statement that the signal was "something unfamiliar".

Petitioner plainly misreads the decision of both the District Court and the Circuit Court in asserting that such decisions have judicially amended the Inland Rules and brought about a confusing commingling of the International and Inland Rules. The decisions below, like the decision of Captain Zustovich to blow a warning signal, rest entirely on the particular circumstances of the case and the array of considerations which compelled the master to warn of the presence and position of his vessel in dense fog. Neither decision can fairly be read as permitting a "choice" between adherence to the signals prescribed by the International Rules and those prescribed by the Inland Rules. Petitioner's dire warnings of impending chaos are clearly contrived for the purpose of the petition.

CONCLUSION

The petition for a *writ of certiorari* should be denied.

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May 1, 1963

APPENDIX A

The additional pertinent provisions of the Inland Rules (33 U.S.C. 151-232) are:

§ 192. *Speed in fog, etc.* (Art. 16)

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. June 7, 1897, c. 4, § 1, 30 Stat. 99."

§ 203. *Steam vessels approaching, meeting, or passing one another; banks obstructing view; leaving dock* (Art. 18)

* * * * *

"Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately *signify the* same by giving several short and rapid blasts, not less than four, of the steam whistle.

* * * * *

"Rule IX. The whistle signals provided in the rules under this article, for steam vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the daytime by a sight of the vessel itself, or by night by seeing its signal lights.

"In fog, mist, falling snow or heavy rainstorms, when vessels cannot so see each other, fog signals only must be given. June 7, 1897, c. 4, § 1, 30 Stat. 100; Aug. 21, 1935, c. 595, § 2, 49 Stat. 669."